BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JERROD D. WALDRON, Claimant, v. JACOB R. NELSON, dba NELSON HOME BUILDERS, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-006417** **2006-515032** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed October 29, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Pocatello, Idaho, on April 8, 2008. Claimant appeared *pro se*. M. Jay Meyers of Pocatello represented Surety with regard to the February 24, 2006 injury. Employer was uninsured at the time of the February 10, 2006 injury. Jacob R. Nelson attended the hearing on behalf of Employer, but did not offer independent evidence or argument. Claimant and Surety submitted oral and documentary evidence. No post-hearing depositions were taken. Post-hearing briefs were submitted by Claimant and Surety. This matter came under advisement on September 8, 2008.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

2. Whether Claimant is entitled to permanent partial impairment (PPI) and the extent thereof;

3. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment and the extent thereof;

4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;

5. Whether Claimant should be denied income benefits due to intoxication pursuant to Idaho Code § 72-208(2); and

6. Whether Claimant has engaged in injurious practices pursuant to Idaho Code § 72-435.

BACKGROUND AND CONTENTIONS OF THE PARTIES

Claimant sustained an industrial injury while working for Employer on February 10, 2006 and sustained a re-injury on February 24, 2006. Employer did not have workers' compensation coverage at the time of the first injury, but obtained coverage with Surety by the time of the second injury. The claims were consolidated into a single proceeding.

Claimant contends that he dislocated his left shoulder on February 10, 2006, when he slipped on a small piece of plywood and fell. After this accident, he performed light-duty type work for a week-and-a-half. He experienced a second dislocation on February 24, 2006, when setting up scaffolding with a co-worker. Claimant has experienced multiple dislocations since that time. He admits to a history of substance abuse, but denies being intoxicated while at work on either date of injury. He wants his medical bills to be paid.

Surety contends that Claimant's drug abuse and criminal history negatively impact his credibility. Surety asserts that Claimant's continued substance abuse and poor judgment have caused additional dislocations. Claimant ignores medical restrictions and has failed to consistently pursue follow-up care as instructed. Surety seeks to be relieved of liability due to Claimant's intoxication at the time of the February 24, 2006 injury, and because Claimant has engaged in injurious practices. Surety further asserts that Claimant has not met his burden of proof to establish disability and that Claimant's felony convictions, probation and revocation of probation preclude a finding of disability because Claimant has essentially taken himself out of the labor market.

Employer has not articulated its position on the disputed issues. Mr. Nelson's conduct at hearing reflects that Employer joins in the affirmative defenses of intoxication and injurious practices with regard to both dates of injury.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Defendants' Exhibits A through K; and

2. The testimony of Claimant, co-worker Kerry Lattimer, and Claimant's mother Teresa Waldron, taken at hearing.

After having considered all the above evidence and the briefs of Claimant and Surety, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 23 years of age and resided in Pocatello at the time of hearing. He completed the 10th grade and obtained a GED in September 2005. Claimant denies left shoulder

problems or medical treatment to his left shoulder prior to February 2006. His medical history includes right thumb surgery, depression, and attention-deficit disorder.

2. Claimant went to work for Employer in November 2005 as a general laborer and framer. He worked on three residential housing projects. Jacob Nelson was his supervisor. Timothy Roth and Kerry Lattimer were co-workers. He earned $9 per hour.

3. On February 10, 2006, Claimant was working in the garage of a partially constructed house when Mr. Nelson asked him to get a staple gun. Claimant walked around to the back of the house and slipped on a piece of scrap plywood that was on top of another piece of lumber. There was snow and ice on the ground. Claimant extended his left arm to catch himself and struck his left elbow while his arm was rotated. Mr. Nelson and Mr. Lattimer either witnessed the fall or came upon Claimant immediately after the fall. They helped Claimant up and into the garage. Mr. Roth made an unsuccessful attempt at popping Claimant's shoulder back into place.

4. Mr. Nelson drove Claimant to an urgent care clinic. The clinic declined to treat Claimant's condition and referred him to the emergency room. Mr. Nelson drove Claimant to the emergency room at Portneuf Medical Center. During the drive, Mr. Nelson said, "I'm screwed," and explained that he was not in a good situation because he did not have insurance. Claimant felt bad for Mr. Nelson and indicated that he would "tell the hospital that something else happened." Claimant lied to the medical staff and told them that he injured his shoulder at home lifting firewood. Transcript, pp. 18-19.

5. Portneuf Medical Center triage notes from February 10, 2006, indicate a possible shoulder dislocation as the result of falling on ice. Nurses' notes state that Claimant "states he was carrying lumber and slipped on the ice at his home." Defendants' Exhibit B, p. 14.

6. Claimant testified that he regrets lying to medical personnel about his place of injury and explained that he did not understand the potential ramifications of his actions. Mr. Lattimer's testimony corroborates the description of Claimant's February 10, 2006 injury occurring at work. Mr. Nelson offered no evidence to the contrary.

7. Chart notes from February 10, 2006, indicate that Claimant's social history includes cannabis abuse. However, examination notes reflect that Claimant's eyes were normal to inspection; he demonstrated no focal, motor, or sensory deficits; he was oriented to person, place, and date; and he demonstrated normal affect, insight, and concentration. No drug screen was performed and there is no indication that Claimant presented to the emergency room in a state of intoxication. Defendants' Exhibit B, pp. 22-23.

8. Claimant was discharged from the emergency room with a final diagnosis of left shoulder dislocation. Claimant was instructed to follow-up with Richard Wathne, M.D. He was provided with pain medication and a shoulder immobilizer. Work restrictions were not addressed in the discharge instructions, but Claimant recalls that he was instructed to take a week off and then go back to light-duty work with no overhead lifting or strenuous use of the left arm.

9. Claimant returned to work within three or four days because he needed money to pay his bills. His shoulder felt pretty good and he did not think that he was in danger of having another dislocation.

10. By February 24, 2006, Claimant resumed regular-duty work and was setting up scaffolding in the back of a house with Mr. Lattimer. As Claimant lifted the scaffolding above his head and extended his arm, his left shoulder dislocated. Mr. Lattimer drove Claimant to the emergency room at Portneuf Medical Center.

11. Willis E. Parmley, M.D., evaluated Claimant at the emergency room on February 24, 2006, and diagnosed a second dislocation. Claimant reported that he returned to full activity after the initial dislocation and was doing well until lifting a large object above his head at work. Once the dislocation was reduced, Claimant's x-rays were normal. Claimant was given a sling and instructed to refrain from using his left arm until he followed up with Vermon Esplin, M.D.

12. Nursing notes from February 24, 2006, reflect Claimant's social history of cannabis abuse, but do not indicate that Claimant demonstrated signs of intoxication at the time of his evaluation. Claimant was described as alert, oriented and in pain distress. There is no indication that a drug screen was requested or performed.

13. Claimant followed up with Dr. Esplin at Idaho Orthopaedic & Sports Clinic on March 7, 2006, but was actually seen by Matt McKinley, PA-C, at the direction of S.L. Coker, M.D. Post-reduction x-rays were described as normal. Claimant was educated about the nature of his injury and referred to physical therapy for shoulder stabilization. Claimant started a new job performing tree removal and was advised that he could return to work as tolerated, but to avoid climbing ladders and overhead lifting. It was recommended that Claimant follow up in approximately one month, but there is no indication that Claimant did so. Defendants' Exhibit D, pp. 1-2.

14. Claimant voluntarily left his job with Employer because he felt that a conflict of interests had developed. He went to work for Larsen Tree Service.

15. Claimant was evaluated two additional times at Portneuf Medical Center for left shoulder dislocation. Neither dislocation was work-related, and both records reflect that Claimant was intoxicated when he reported to the emergency room. On May 22, 2006, Claimant

dislocated his left shoulder arm wrestling. He was held in the emergency room for a period of observation based on the "amount of ETOH" and because he did not have any friends that were sober enough to drive him home. The dislocation was successfully reduced. Claimant returned to the emergency room on June 13, 2006, with his fourth dislocation, which occurred when Claimant broke branches from a lilac bush in his mother's yard out of anger. Claimant reported that he was intoxicated at the time and was having a social crisis due to legal and emotional stressors. Defendants' Exhibit B, pp. 34-51.

16. Claimant had three more dislocations (his 5th, 6th and 7th) while incarcerated in the Idaho Correctional Center during 2007. On January 17, 2007, Claimant experienced a dislocation while lifting weights. On February 4, 2007, Claimant experienced a dislocation while playing softball. On May 8, 2007, Claimant experienced a dislocation while playing basketball. On all three occasions, Claimant was taken to the emergency room at St. Luke's, where his left shoulder was successfully reduced.

17. Claimant was incarcerated from mid-to-late 2006 through February 27, 2008. Claimant was on parole for previous convictions when he went to work for Employer. Parole was revoked on September 16, 2006, but the exact date of incarceration is unclear from the evidence. Claimant was released on February 27, 2008, to the custody of his mother.

18. Claimant testified that he has experienced multiple subsequent dislocations that are undocumented because he was taught how to self-reduce his left shoulder during his last visit at St. Luke's in May 2007. Some dislocations have occurred during strenuous activities and others have occurred in his sleep.

19. Mr. Lattimer testified that Claimant was sober and abstaining from drug use at work on both February 10th and 24th, 2006. Mr. Lattimer was smoking pot around that period of

time and used to smoke pot with Claimant. He was not aware of Claimant being intoxicated in any fashion on those two days, and thinks that he would have known if Claimant had been high because he used to get high with Claimant all of the time and could tell whether or not Claimant was using. He understood that Claimant was abstaining because he was on probation.

20. Claimant attended counseling at Health West Clinic for substance abuse and psychological issues. As of January 4, 2006, he was determined to discontinue drug use. He was "doing well" by February 8, 2006, and was attending college courses. He reported a relapse with alcohol and marijuana on February 22, 2006. He was evaluated for antidepressant medication on February 23, 2006, and presented with normal thoughts, good eye contact and neat appearance.

DISCUSSION AND FURTHER FINDINGS

Medical Benefits

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally

conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979).

21. It is undisputed that Claimant sustained accidents on February 10th and 24th, 2006, and that Claimant dislocated his shoulder as the result of both injuries. Claimant's medical treatment following the February 10, 2006, injury is limited to his emergency room visit on the day of injury. Claimant did not seek additional care until his injury of February 24, 2006.

22. Employer did not have workers' compensation insurance on February 10, 2006, and is subject to the mandatory penalty set forth in Idaho Code § 72-210 which states:

> If an employer fails to secure payment of compensation as required by this act, an injured employee, or one contracting an occupational disease, or his dependents or legal representative in case death results from the injury or disease, may claim compensation under this law and shall be awarded, in addition to compensation, an amount equal to ten per cent (10%) of the total amount of his compensation together with costs, if any, and reasonable attorney's fees if he has retained counsel.

Claimant did not retain counsel and has not established the existence of attorney fees or costs. However, Employer is liable for medical care rendered to Claimant for his left shoulder on February 10, 2006, along with a 10% penalty pursuant to Idaho Code § 72-210.

23. Claimant sought emergency room treatment for his injury of February 24, 2006, and attended a follow-up evaluation on March 7, 2006. Claimant has established that his left shoulder treatment on February 24, 2006, and March 7, 2006, are causally related to his February 24, 2006, injury.

24. Medical treatment sought by Claimant on and after May 22, 2006, resulted from multiple intervening injuries. The medical records establish that Claimant's initial left shoulder dislocation made him susceptible to recurrent dislocations and that his chances of recurrence increase with each dislocation. However, the medical records attribute each documented

dislocation to a specific incident or injury and do not causally relate Claimant's ongoing dislocations to his February 2006 injuries. Defendants are not liable for medical benefits on or after May 22, 2006.

Permanent Partial Impairment

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

25. No evidence was submitted to establish that Claimant has permanent impairment as a result of his February 2006 industrial injuries. There are no medical opinions addressing permanent impairment and no impairment rating has been assigned for Claimant's left shoulder condition. There is no indication that medical restrictions assigned to Claimant are permanent in nature. Claimant has failed to meet his burden of proof to establish permanent impairment.

Permanent Partial Disability

The burden of proof is on Claimant to prove the existence of any disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). "Evaluation (rating) of permanent disability" is an appraisal of the Claimant's present and probable future ability to

engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425. Although concepts of permanent impairment and permanent disability are conceptually distinct, there must be a finding of impairment in order for disability to exist. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

26. Because Claimant failed to establish that permanent impairment resulted from his February 2006 industrial injuries, he cannot establish the existence of permanent disability.

Apportionment

Idaho Code 72-406 states:

> DEDUCTIONS FOR PREEXISTING INJURIES AND INFIRMITIES. (1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease. (2) Any income benefits previously paid an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease.

27. The issue of apportionment is moot because Claimant failed to establish the existence of permanent disability.

Intoxication

"Intoxication" is defined as being under the influence of alcohol or controlled substances. Idaho Code § 72-208(3).

> If intoxication is a reasonable and substantial cause of an injury, no income benefits shall be paid, except where the intoxicants causing the employee's intoxication were furnished by the employer or where the employer permits the employee to remain at work with knowledge by the employer or his supervising agent that the employee is intoxicated.

Idaho Code § 72-208(2).

28. An employer or surety who seeks to be relieved of liability because of a claimant's intoxication bears the burden of proving that the claimant was intoxicated at the time of his or her injury and that intoxication is a reasonable and substantial cause of the injury. *Potter v. Realty Trust Co*., 60 Idaho 281, 90 P.2d 699 (1939).

29. There is no evidence that Claimant was intoxicated at the time of either of his industrial injuries in February 2006. Claimant denies being under the influence of drugs or alcohol at the time of both injuries. Medical records from both dates of injury reflect that Claimant's mental state was normal and fail to document signs of intoxication. Mr. Lattimer's testimony regarding Claimant's abstinence is subject to challenge since it is based, in part, on his past experiences of engaging in drug use with Claimant. However, there is no evidence to contradict the testimony of either Claimant or Mr. Lattimer on the issue of intoxication, and their testimony is consistent with the contemporaneous medical evidence. The fact that Claimant has a well-documented history of substance abuse and a tendency to injure himself while intoxicated does not establish that Claimant was intoxicated on either February 10th or 24th of 2006.

30. Employer and Surety failed to meet their burden of proof to establish that Claimant was intoxicated. However, this determination is merely *dicta* in light of the fact that a finding of intoxication does not impact a defendant's liability with regard to medical benefits and only precludes an award of income benefits.

Injurious Practices

Idaho Code § 72-435 states:

> If an injured employee persists in unsanitary or unreasonable practices which tend to imperil or retard his recovery the commission may order the compensation of such employee to be suspended or reduced.

31. Claimant likely made a poor judgment call when he engaged in overhead lifting of the scaffolding on February 24, 2006, which resulted in his second dislocation. However, his conduct does not constitute an injurious or unreasonable practice. The credible evidence establishes that Claimant believed his condition was improved and he did not anticipate the second dislocation.

32. It is unnecessary to reach a determination as to whether Claimant's conduct on and after May 22, 2006, constitutes unsanitary or unreasonable practices based on the determination that Defendants are not liable for medical benefits beyond that date due to Claimant's multiple intervening injuries.

CONCLUSIONS OF LAW

1. Employer is liable for medical treatment to Claimant's left shoulder rendered on February 10, 2006, as well as a 10% penalty on that amount pursuant to Idaho Code § 72-210.

2. Defendants are liable for medical treatment to Claimant's left shoulder rendered on February 24, 2006, and March 7, 2006.

3. Claimant failed to establish entitlement to permanent partial disability benefits.

4. Claimant failed to establish entitlement to permanent partial or permanent total disability in excess of impairment benefits.

5. Apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is moot.

6. Claimant's recovery is not limited because of either intoxication or unsanitary practices.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this __24th__ day of October, 2008.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JERROD D. WALDRON, Claimant, v. JACOB R. NELSON, dba NELSON HOME BUILDERS, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-006417** **2006-515032** **ORDER** Filed October 29, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Employer is liable for medical treatment to Claimant's left shoulder rendered on February 10, 2006, as well as a 10% penalty on that amount pursuant to Idaho Code § 72-210.

2. Defendants are liable for medical treatment to Claimant's left shoulder rendered on February 24, 2006, and March 7, 2006.

3. Claimant failed to establish entitlement to permanent partial disability benefits.

4. Claimant failed to establish entitlement to permanent partial or permanent total disability in excess of impairment benefits.

5. Apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is moot.

6. Claimant's recovery is not limited because of either intoxication or unsanitary practices.

7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this ___29th___ day of ____October___, 2008.

INDUSTRIAL COMMISSION

___/s/_____
James F. Kile, Chairman

___/s/_____
R.D. Maynard, Commissioner

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __29th___ day of ___October_____ 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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Gina Espinosa